

**STATE OF NEW HAMPSHIRE
INSURANCE DEPARTMENT
169 Manchester Street
Concord, NH 03301-5151**

**Charles N. Blossom
Insurance Commissioner**

BULLETIN

TO: All Interested Parties

FROM: Charles N. Blossom
Insurance Commissioner

DATE: June 27, 1997

**RE: Application of the New Hampshire Insurance Code to
Health Benefit Arrangements Involving Risk
Assumption by Unlicensed Entities**

I. ISSUE

New Hampshire's insurance laws provide for the licensing and regulation of entities offering health care insurance. Such insurance may be offered by commercial insurance companies, nonprofit health service corporations and health maintenance organizations.¹ As insurers, these licensed entities are permitted to engage in the business of health care risk assumption. One of the many changes in the health care services industry is the expansion of risk-assumption by persons and unlicensed entities, through various health benefit arrangements. The development of these non-traditional risk-bearing entities raises questions as to their appropriate regulation.

The New Hampshire Insurance Department ("Department") is charged with the regulation of all insurance-risk-assuming entities so as to ensure their solvency, and to ensure consumer access to reasonably priced quality health insurance, as well as to promote fair competition among all insurance-risk-assuming entities. This bulletin sets forth the circumstances in which the Department will consider health care provider entities to be engaged in the business of health insurance and subject to regulation under the insurance code.

¹These entities are licensed and regulated pursuant to RSA 402 and RSA 405; RSA 420-A; and RSA 420-B, respectively. Alternative licensing may be available pursuant to RSA 420-B:23, which authorizes the Commissioner to license systems of health care delivery and financing on a limited basis or on an exception basis.

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II. THE BUSINESS OF INSURANCE

The primary elements of the “business of insurance” are the spreading of risk and the underwriting of a policyholder’s risk. New Hampshire-Vermont Health Service v. Whaland, 119 NH 886, 893 (1979); Group Life & Health Ins. v. Royal Drug Co., 440 US 205, 210 (1979); see also In Re Beacon Health, Inc., 105 BR 178 (Bkrtcy D.NH 1989). Any risk-assuming entity which is in the business of insurance falls under the jurisdiction, regulation and licensing requirements of the New Hampshire insurance code. State laws and regulations with respect to policy forms, mandated benefits, premium rates, unfair trade practices, solvency requirements, taxation, and other matters apply to entities engaged in the business of health insurance. Provider entities which underwrite and assume risks directly from employers and other unlicensed payors must be licensed under an appropriate insurance company statute.

III. WHEN RISK-ASSUMPTION CONSTITUTES THE BUSINESS OF INSURANCE

An agreement between one or more health care providers and one or more purchasers of health care services constitutes the business of insurance and will subject the provider(s) to licensure by the Department if the following two conditions exist:

- 1) the provider(s) are compensated for the actual or potential delivery of health care services in a manner that involves the provider(s) assuming all, or part, of the total expense of all such services²; and
- 2) the ultimate purchaser(s) are individuals or entities that have not been issued a certificate of authority (i.e. licensed) under the insurance code.

IV. IMPLICATIONS OF EMPLOYEE RETIREMENT INCOME SECURITY ACT (ERISA)

Generally, employer sponsored employee benefit plans that are operated on a “self-funded” basis are exempt from state insurance regulation pursuant to the preemption provisions of ERISA. However, when an employer transfers the risk of excess medical expense associated with its employee benefit plan to a licensed insurer, that benefit plan is treated under ERISA as a “fully insured plan”. The licensed insurer assuming the employer’s risk is subject to state insurance regulation. Again, state laws and regulations with respect to policy forms, mandated benefits, premium rates, unfair trade practices, solvency requirements, taxation and other matters apply to the insurer and will apply indirectly to a fully insured employee benefit plan. Similarly, when a provider sponsored organization assumes risks associated with an employee benefit plan, the Department will consider the employee benefit plan to be a “fully insured plan”. In such cases, the provider organization must be licensed as an insurer and will be subject to the same state laws and regulations which apply to the other, similarly licensed insurers.

²These compensation methods include capitation, percentage of revenue, fixed payments (global fees), provider incentive payouts (such as withholds, bonus/penalty and risk pool arrangements) and similar compensation arrangements.

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Municipal associations may also be exempt from insurance regulation under RSA 5-B when they self-insure through risk management programs. However, the transfer of risk -- to a provider sponsored organization, for example -- effectively relinquishes the exempt status of that risk program and the contracting provider sponsored organization must be licensed as an insurer.

V. CONCLUSIONS

- New Hampshire law requires the licensure of any risk-bearing entity that is conducting the business of insurance. You should contact the Department if you have questions about the application of the insurance code.
- This bulletin shall not be construed to prohibit risk-sharing arrangements between provider(s) and health maintenance organizations or other insurance company licensees, to provide services to a specified population.
- Risk-bearing entities engaged in the business of insurance which are not in compliance with this bulletin shall be subject to the disciplinary provisions of the insurance code.